No. 85-224

In The
Supreme Court of the United States
October Term, 1985

CITY OF RIVERSIDE, et al.,
Petitioners,

vs.

SANTOS RIVERA, et al.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed a District Court's award of attorney's fees as reasonable under 42 U.S.C. § 1988 where the record contained substantial evidence that the District Court had reconsidered and redetermined the award in light of the standards established in *Hensley v. Eckerhart.*

PARTIES INVOLVED

The following parties have an interest in the outcome of this case:

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, MANUEL FLORES, JR., Plaintiffs and Respondents;

ROY B. CAZARES, GERALD P. LOPEZ, Attorneys at Law;

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, ROBERT PLAIT, Defendants and Petitioners.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondents are all Chicanos who live in or near the City of Riverside, California. In August 1975 they were all in attendance at a party given at the home of Santos, Jennie and (their son) Donald Rivera for their nephew Lee Roy Rivera. As the District Court found, "a large number of unidentified police officers of the City of Riverside without a warrant, but with tear gas and unnecessary physical force, broke up the party and arrested many of the people in attendance, including four of the [respond-

ents]," though "[t]he party was not creating a disturbance in the community at the time of the break-in." (Petition Appendix 2 (hereinafter Pet. App.) at 2-3.) Criminal prosecutions were tenaciously pursued, but the "charges were discissed for lack of probable cause." (Pet. App. 2 at 2-3.) Testimony introduced by respondents at trial, which led to judgments for constitutional deprivations against both the City of Riverside and individual police officers, included evidence of seriously misstated facts in police reports that served as the basis for the alleged probable cause for the break-in, the arrests and the criminal prosecutions.

At the beginning of the case, the details of the break-in, arrests and subsequent activity of the police officers and other city officials were sketchy, confused, and almost exclusively within the knowledge of the petitioners and the other officials of the City of Riverside. Which of the tens of police officers involved did exactly what (both at the Rivera home and later) with whom and to whom was unknown and unlearnable. Under these circumstances, respondents sued thirty-two defendants, including the City of Riverside and individual police officers, alleging civil rights and pendent state tort violations.[1] The District

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[1] Petitioners incorrectly assert that respondents brought 22 claims against each and every defendant. (See, e.g., Pet. at 8.) The original complaint states seven causes of action, encompassing claims alleged on the bases of 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and for false imprisonment, malicious prosecution and negligence. Only the § 1983 and state pendent claims ultimately were tried to the jury. While what is labeled in the complaint as "Seven Causes of Action" might well be interpreted to be something more than seven claims, petitioners'

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Court concluded that the factual uncertainties and complexities made it "reasonable for plaintiffs initially to name thirty one individual defendants [thirty police officers and the chief of police] as well as the City of Riverside as defendants in this action." (Pet. App. 2 at 2-4.) Even through the trial itself, testimony of petitioners and other police officers was often in conflict as to the respective roles of individual police officers involved in the constitutional deprivations. (Pet. App. 2 at 2-4.)

After four years of discovery and two settlement conferences[2], a nine day trial ensued on the § 1983 and state pendent claims. The jury, following seven days of deliberation, found in favor of all eight respondents and against the City of Riverside and five individual officers on § 1983, negligence, false arrest and false imprisonment claims. The jury awarded total damages of $33,350.[3]

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grand total of 22 seems disingenuous and calculated to mislead. Petitioners do not reveal how they arrive at their final figure, but if one examines pages 6 and 7 of the petition, it appears that petitioners simply added together what they themselves have lifted from the original complaint and now describe as "claims." Included on petitioners' list of "claims" are references to a statutory choice of law and attorney's fees provision (42 U.S.C. § 1988), specific items of compensatory and punitive damages (bodily injury, property damages), and general prayers for relief.

[2] The District Court ordered and personally presided over both conferences. After being urged by the District Court to reconsider the substantial risk of liability at trial, petitioners' counsel made a final offer of $10,000 on behalf of his clients—that is, a final offer of $10,000 in satisfaction of all respondents' claims, attorney's fees and costs. (Pet. App. 2 at 2-4; 15 at 15-6 and 15-7.)

[3] The petitioners declare that "no restraining order issued as a result of this litigation." (Pet. at 9.) Conspicuously absent

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On December 1, 1980, respondents moved for reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. Petitioners filed extensive written opposition, and oral argument was heard on January 19, 1981. Nearly three months later the District Court, "having heard and considered oral argument and having examined and considered the memoranda, affidavits and exhibits filed by the parties," awarded respondents $245,456.25 in attorney's fees ($2,112.50 of which was for law clerk fees) on the basis of written Findings of Fact and Conclusions of Law entered on April 7, 1981. (See Pet. App. 6 at 6-1—6-2.) In so doing, the District Court refused to apply the multiplier requested by respondents. Moreover, it reduced respondents' original request by those costs the District Court found to be beyond the intended scope of § 1988.

The Ninth Circuit affirmed the District Court's award as reasonable under § 1988. *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982). (See Pet. App. 1) The Ninth Circuit reviewed the record in detail and concluded that the District Court "considered, applied and discussed

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from the petition is any report of why and under what circumstances injunctive relief did not issue. At one of several hearings on respondents' motion for attorney's fees and in the face of petitioners' efforts to reduce the fees because injunctive relief had not been granted, respondents' counsel advised the District Court that injunctive relief had not been sought at the close of trial because requesting that petitioners be enjoined to "obey the law" seemed too broad. The District Court nonetheless observed, sua sponte, that "if you [respondents] had asked for it against some of the officers I think I would have granted it." (See Brief in Opposition Appendix A (hereinafter Opp. App.) at A-2.) The District Court's receptiveness to a request for equitable relief is understandable in light of its written findings regarding the nature and severity of the constitutional deprivations proven at trial. (See, e.g., Pet. App. 2 at 2-5, and 2-8.)

the Kerr factors necessary to support the award." 679 F.2d at 797 (referring to *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), which adopted these guidelines from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). Rejecting petitioners' argument that all twelve factors adopted by the Ninth Circuit in *Kerr* must be mechanically invoked and discussed, the Ninth Circuit repeated that the District Court must and did consider those factors "called into question by the case at hand and necessary to support the reasonableness of the fee award." 679 F.2d at 797.

Petitioners sought a Writ of Certiorari on January 13, 1982 and respondents filed a Brief in Opposition. On May 16, 1983 this Court decided *Hensley v. Eckerhart*, 461 U.S. 424 (1983). On May 31, 1983 this Court granted petitioners' writ, and vacated and remanded the case for reconsideration in light of *Hensley*. The Court took the same action on every case on its docket related to the issues decided in *Hensley*. See, 461 U.S. 951-952 (1983)

Respondents' request for reasonable attorney's fees and costs was reconsidered by the District Court. Two hearings were held by the District Court. In preparation for the first hearing of October 24, 1983 (Pet. App. 2 at 2-1), the District Court reviewed and reconsidered all memoranda submitted with respect to the question of attorney's fees, including all memoranda submitted after the order vacating the first award and mandating reconsideration in light of *Hensley*. At this first post-remand hearing, petitioners again brought to the District Court's attention the same arguments they had raised earlier before the District Court and before the Ninth Circuit on appeal — the same factually specific arguments they now raise in the present petition. The District Court listened to these

arguments, declared its intention carefully to review the record, to request additional information if necessary and, pursuant to *Hensley's* mandate, to provide a more explicit explanation of whether the attorney's fee award was justified as reasonable. (Pet. App. 15.)

After this first hearing, the District Court spent a full six and one half months reviewing the record. (See Appendix B.) A second hearing was held on June 6, 1984 where arguments were again iterated in light of *Hensley's* standards and the thoroughly reviewed record. On July 26, 1984 the District Court issued comprehensive Findings of Fact and Conclusions of Law, awarding respondents attorney's fees in the amount of $243,343.75 plus $2,112.50 for fees expended for law clerks, exclusive of interest. (Pet. App. 2.) The District Court refused to apply the multiplier requested by the respondents, and further reduced the requested award by those costs the District Court found to be not contemplated by the statute.

The Ninth Circuit, finding the case suitable for decision without oral argument, affirmed the District Court's award. (Pet. App. 1 at 1-2.) After reviewing the District Court's award in light of the record, the Ninth Circuit rejected the same arguments petitioners now raise in the instant Petition. The Ninth Circuit concluded that the District Court carefully examined the record and correctly applied the *Hensley* criteria in arriving at the award and justifying the award as reasonable. (Pet. App. 1.) On August 5, 1985, the Ninth Circuit denied petitioners' motion to stay the mandate. On August 15, 1985, Justice Rehnquist temporarily stayed the mandate of the Ninth Circuit, and on August 28, 1985, Justice Rehnquist issued an in chambers opinion staying the mandate pending disposition of the petition for certiorari.

ARGUMENT

Reasons for Denying the Writ

I. Both The District Court And The Court Of Appeals Correctly Applied Hensley On Remand.

On May 16, 1983 this Court granted petitioners' Writ for Certiorari and remanded the present case "for further consideration in light of *Hensley.*" After remand, the District Court held two additional hearings on the application of Hensley — on October 24, 1983 and on June 5, 1984. Before each hearing, the District Court reviewed all new memoranda filed by both petitioners and respondents, and the record that pre-existed the remand order. Indeed the District Court took a full six and one-half months between the first and second hearing to review the entire record and to reconsider the attorney's fee award in light of the Hensley standards. (Opp. App. B) On July 26, almost two months after the second post-remand hearing, the District Court issued comprehensive Findings of Fact and Conclusions of Law, specifically applying the Hensley criteria and explaining the reasons for the award clearly and precisely as required by this Court. *Hensley v. Eckerhart,* 461 U.S. 425, 437 (1983).

Finding that all claims by respondents were based on a common core of facts and involved related legal theories, the District Court concluded that respondents "achieved a level of success . . . that makes the total number of hours expended by counsel a proper basis for making the fee award." (Pet. App. 2 at 2-10.) The District Court also found that the "central and most important issue in this case was whether there was police misconduct committed by and condoned by defendants. Plaintiffs established this

misconduct to the satisfaction of the jury and the Court." (Pet. App. 2 at 2-6.)

In response to petitioners' contention that the amount of monetary damages alone necessarily detracts from the significance of the overall relief obtained, the District Court made a series of interrelated findings. First, the District Court explained the size of the award:

> In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case.
>
> (See Pet. App. 2 at 2-5—2-6.)

The District Court then made additional related findings on the nature and the degree of overall success and the relationship of this success to the reasonable hours expended:

> Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding . . . Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occurred. The amount of time expended by plaintiffs' counsel was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.
>
> (See Pet. App. 2 at 2-7—2-9.)

These written Findings of Fact and Conclusions of Law are consistent with the District Court's statements made at the second post-remand hearing — a hearing held after months studying the complete record. For example, the District Court observed:

> And I think having looked at the whole file and having looked at that case on five or six occasions that now we will have to have some findings and I want to tell you how I feel about this.
>
> I feel that the award of fees that I gave was entirely appropriate and I went through again and looked at all of the verdicts and I have considered in depth what kind of work went into the case and I am even inclined to think that there should have been a multiplier. I didn't give a multiplier because I took into consideration the fact that not all of the people who were sued were the subject of a jury verdict. The fact that the verdicts were not extremely large is due to the restrained nature in which that case was tried and I have said that before and I repeat it now, the result in my opinion was excellent. You can hardly say that they were not successful when they had 37 jury verdicts and in each one of those jury verdict groups the City of Riverside was found responsible, was held liable and there were five police officers in the group against whom the verdicts were rendered and I am just absolutely convinced that the total accomplishment of this case was quite extraordinary.
>
> I have tried several civil rights violation cases in which police officers have figured and in the main they [police officers] prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have resources to answer those verdicts. The relief here I think was absolutely complete. I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success.

(See Opp. App. B at B-4 & B-5.)

Later at that same hearing, the District Court returned to these same interrelated factors:

> I think that here the time was well spent . . . The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it. It reflected a total lack of professionalism on the part of the police there and the improper motivation which appeared as a result of all this seemed to me to have pervaded a very broad segment of police officers in the department.

(See Opp. App. B at B-7.)

The Court of Appeals, in turn, reviewed whether or not the District Court had followed Hensley by focusing on the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation. (See Pet. App. 1 at 1-7.) The Court of Appeals concluded that "this relationship is precisely what the district court focused on," and that the District Court "found a reasonable relationship between the extent of that success and the amount of the award." (See Pet. App. 1 at 1-7.) Because the District Court "clearly and precisely explained the grounds for its decision" (*Hensley,* 461 U.S. 424, 437 (1983)), the Court of Appeals concluded that the award of fees was well within the District Court's discretion. (See Pet. App. 1 at 1-10.)

In response to petitioners' argument that the fee award and the monetary damages must be strictly proportional, the Court of Appeals concluded that the legislative history of § 1988 offered no support for this position. Citing the Senate Report that accompanied the Senate bill which became The Civil Rights Attorney's Fees Awards Act of 1976, the Court of Appeals observed that an award

of attorney's fees under § 1988 should "not be reduced because the rights involved may be non-pecuniary in nature." (See Pet. App. 1 at 1-8.)[4] Rather, § 1988's purpose is to ensure "effective access to the judicial process." (See Pet. App. 1 at 1-8.) Thus, while the size of the damage award is relevant to the determination of the signficance of the overall relief, the fee award itself need not bear a a strict or mechanical proportionality to the monetary damages recovered.

In *Hensley,* this Court insisted that a "request for attorney's fees should not result in a second major litigation." 461 U.S. 437 (1983) The complaint in this case was filed in 1976 about an event that occurred in August 1975. The jury rendered verdicts for respondents and against petitioners in 1980. Reasonable attorney's fees were first awarded by the District Court in April 1981. Twice the Court of Appeals has reviewed the District Court's work and twice found it responsible and within the District Court's discretion.

Both the fee-awarding and the fee-reviewing courts have done precisely what this Court ordered on remand. In such a case, it seems precisely contrary to this Court's decision in Hensley to permit a transparently meritless petition for Writ of Certiorari to delay further respondents' legitimate claim to reasonable attorney's fees. Writs of Certiorari were not designed to be deployed to that end.

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[4] The passage from the Senate Report of which this statement is a part follows: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases [,] and not be reduced because the rights involved may be nonpecuniary in nature. S.Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976); Accord H. R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976).

II. The Conflict Between Circuits Asserted By Petitioners Does Not Exist.

The conflict asserted by petitioners does not exist. Indeed, it is difficult to discern precisely what conflict petitioners are attempting to describe. Petitioners cite only three cases from other circuits in the body of their argument — two First Circuit cases (*Grendel's Den, Inc., v. Larkin*, 749 F.2d 945 (1st Cir. 1984) and *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984)) and one Eleventh Circuit case (*Ramos v. Lamm*, 713 F.2d 546 (11th Cir. 1983)).[5] Presumably these cases represent "conflicting" views on the application of *Hensley*, though petitioners fail to identify explicitly the conflict in question. Yet a review of these three cases emphatically contradicts any claim, implicit or explicit, that conflict exists between either the First or the Eleventh Circuit and the Ninth Circuit's application of *Hensley* in the present case.

All three Circuits view their respective opinions as entirely consistent with a straightforward application of

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[5] Petitioners also cite a fourth case, the Ninth Circuit's decision in *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983). Petitioners do not cite this recent Ninth Circuit case because it conflicts with either the First Circuit's or the Eleventh Circuit's decision; indeed, petitioners think *White* agrees with these two other circuits in requiring a District Court to scrutinize time records before awarding reasonable fees. (Pet. 49-51.) In the instant case, the Ninth Circuit required the District Court to scrutinize the record in a manner consistent with *White* and the mandate of both the First and Eleventh Circuits. Moreover, the Ninth Circuit responded specifically to petitioners' claims that respondents were being compensated for hours unreasonably expended on the litigation: the Ninth Circuit expressly concluded that the District Court's findings regarding what hours were reasonably expended were themselves supported by the record. (Pet. App. 1 at 1-6, 1-7.) It is also noteworthy that both the Ninth Circuit and the District Court rely on *White* in explaining and justifying their decisions. (See Pet. App. 1 at 1-12, n.3; 2 at 2-12 and 2-13.)

Hensley. (For example, compare *Grendel's Den,* 749 F. 2d at 950, and *Ramos,* 713 F.2d at 551-52 with Pet. App. 1 at 1-3 and 1-4.) All these cases stress the care with which a District Court must examine the record in evaluating the hours reasonably expended in light of *Hensley's* standards. (For example, compare *Grendel's Den,* 749 F.2d at 950-51 and *Ramos,* 713 F.2d 553-555 with Pet. App. 1 at 1-5; 1-6; 1-9; at 1-12, n.3.) All three underscore that a District Court must explain specifically the reasons supporting its award — most importantly addressing the explanations that Hensley outlines as most critical. (For example, compare *Grendel's Den,* 749 F.2d at 950 and *Ramos,* 713 F.2d at 552 with Pet. App. 1 at 1-5, 1-6, 1-7.) In establishing these uniform guidelines, all three Circuits retain for themselves the authority to review awards for abuses of discretion while at the same time accepting Hensley's pronouncement that district courts are uniquely suited to make fee award determinations "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what esentially are factual matters." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).[6]

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[6] Petitioners repeatedly insist that respondent's counsel did not exercise "billing judgment" as required by *Hensley,* and, for example, submitted hours that were not contemporaneously recorded, were duplicative and were excessive in light of the task. (See e.g., Pet. at 25, 39-42.) These fact-specific arguments were made twice before both the District Court and the Ninth Circuit, were refuted by respondents in every instance and ultimately twice rejected by the Courts as lacking merit in light of the record and Hensley's standards. To the extent that the First or Eleventh Circuit reached different conclusions about analogous assertions in the cases cited by petitioners, the conclusions reflect the difference between the records before those Circuits and the record twice before the Ninth Circuit. The distinction in outcomes regarding similar assertions made in markedly different contexts does not reveal a conflict between Cirsuits in the application of *Hensley.*

Perhaps as an unintended admission of the obvious absence of conflict between Circuits in the application of *Hensley,* petitioners attempt to contrive conflict by mischaracterizing what happened before the Ninth Circuit. For instance, petitioners assert that the Ninth Circuit "made no mention whatsoever of the most critical issues raised by petitioners . . ." (Pet. at 27.), which "is not to say that the Ninth Circuit specifically rejected these contentions. They simply did not deal with any of them." (Pet. at 27.) Yet a reading of the Ninth Circuit's opinion reveals that it carefully considered each of petitioners' arguments and, in light of the entire record, found them lacking merit. (See e.g., Pet. App. 1 at 1-6, 1-7, 1-8, 1-9.)

Petitioners also repeatedly claim that the Ninth Circuit ignored their contention that the District Court's work demonstrated that the District Court "[had] no intention of being bound by the decisions of the Supreme Court" (Pet. at 30), and the District Court had no "intention of even looking at the record" (Pet. at 61.) In this assertion, petitioners doubly mischaracterize the record. The Ninth Circuit specifically grounded its decision on the District Court's careful adherence to Hensley and the factors relevant in explaining how the award is reasonably related to the outcome of the proceedings. (See e.g., Pet. App. 1 at 1-5 and n 2 at 1-12.) Furthermore, the Ninth Circuit expressly rejected as "meritless" petitioners' contention that the District Court never reviewed the record. (Pet. App. 1 at 1-9.)[7]

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[7] At the first hearing after this Court's remand, the District Court specifically noted that it had reviewed all papers submitted. (See Pet. App. 15 at 15-2.) At the second post-remand

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Petitioners' position can only amount to an insistence that the Ninth Circuit's unfavorable response to their assertion of a series of specific factual arguments constitutes an application of *Hensley* in conflict with the unspecified decisions of other circuits. This position is untenable as a basis for seeking a Writ of Certiorari, and its lack of merit likely weighed in the Ninth Circuit's decision to deny petitioners' motion to stay issuance of the mandate. The Ninth Circuit responsibly reviewed the careful work of a District Court which applied *Hensley* consonant with the approaches of all other circuits in awarding attorney's fees under § 1988. This Court should not grant the petition in this case on the basis of an asserted conflict that does not exist.

III. The Ninth Circuit Correctly Considered Monetary Damages As A Factor In The Determination Of The Relationship Between The Hours Reasonably Expended On The Litigation And The Total Success Achieved.

A. The Ninth Circuit's Rejection of Mechanical Proportionality Is Consistent with Hensley and the Decisions of Other Circuits.

Petitioners' failure to articulate and document conflict between Circuits should itself be reason to deny the petition in this case. But the very generality of petitioners' framing of the Question Presented permits one to find

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hearing, six and one-half months later, the District Court directly alluded to its (1) having ordered the entire record from permanent storage, and (2) having reviewed the "whole file" and "having looked at the case on five or six occasions." (See Opp. App. B at 2, B-4.) The transcript of this second hearing was neither included in petitioners' appendix nor referred to in its petition.

that nearly any related issue is "raised" by the petition before this Court. Thus a substantive inadequacy in seeking a Writ of Certiorari unfortunately may be transformed into a convenient reason to graft onto this case issues not raised in the petition itself.

Among the many issues one might press as encompassed by petitioners' vague articulation of the Question Presented is whether an award of attorney's fees under § 1988 must bear a particular proportional relationship to the amount of monetary damages recovered. While petitioners do not raise this question and do not cite cases defining a conflict on this issue, respondents will address this question in the event it is urged *sua sponte* as an alternative basis for the granting of the Writ.

Petitioners did argue, before the District Court and the Court of Appeals, that the fee award must be strictly proportional to the damage award. On remand, both Courts specifically addressed this argument precisely in the manner outlined by *Hensley*. In those cases where — as both lower courts found in the present case — all claims are based on a common core of facts and involve related legal theories, *Hensley* directs the fee-awarding and fee-reviewing courts' attention to the relationship between the hours reasonably expended and the significance of the overall relief obtained. *Hensley*, 461 U.S. 424, 435-436. In accordance with this directive, both the District Court and the Court of Appeals considered the size of the damage award as a relevant factor in determining the significance of the overall relief obtained, and both Courts concluded that an award of fees for all hours reasonably expended by respondents' counsel was justified. See Argument I, supra.

In rejecting a mechanical test under which a § 1988 fee award must be strictly proportional to the amount of

monetary damages, the courts below simply followed the guidelines established by this Court in *Hensley*. There the Court expressly rejected any mathematical proportionality test — either between issues raised and issues prevailed upon, or between relief sought and relief obtained.[8] "Such a ratio," this Court observed, "provides little aid in determing what is a reasonable fee in light of all the relevant factors." *Hensley*, 461 U.S. at 436, n.11. Thus, "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Id.* Just as it rejected a mechanical proportionality test, this Court also rejected that there is "precise rule or formula for making these determinations." *Id* at 436. In awarding fees, a district court "necessarily has discretion in making this equitable judgment." *Id* at 437.

In following *Hensley's* rejection of a mechanical proportionality test, and in applying *Hensley's* multi-factor reasonable relationship test to evaluate the work expended in light of the overall results obtained, the Ninth Circuit's decision in the present case is consistent with the decisions of other circuits which have addressed this question. The Seventh Circuit, for example, in a case in which the district court granted $1.00 in nominal damages along with an injunction and a declaratory judgment, held that the nominal nature of damages is a factor to be considered in determining the amount of a fee award, but it agreed with the First Circuit that a nominal damage award does not itself require an equally nominal attorney's fee award. See *Lynch*

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[8] Or, as this Court also described its holding, it is not "necessarily significant that a prevailing plaintiff did not receive all the relef requested." *Hensley*, 461 U.S. at 436, n.11.

v. City of Milwaukee, 747 F.2d 423, 428-429 (7th Cir. 1984); *Perez v. University of Puerto Rico,* 600 F.2d 1, 2 (1st Cir. 1979).

The Second Circuit, following Lynch, has also rejected a mechanical proportionality test and has held that "[a]warding attorney's fees in a manner tying that award to the amount of damages would subvert the statute's goal of opening the court to all who have meritorious civil rights claims." *DiFilippo v. Morizio,* 759 F.2d 231 (2d Cir. 1985), quoting *Lynch v. City of Milwaukee,* 747 F.2d at 429. The Second Circuit in *DiFilippo,* like the Seventh Circuit in *Lynch,* refused to adopt a mechanical standard that would either increase or reduce fees simply because a monetary damage "award viewed in some absolute terms is high or low." 759 F.2d at 235. The Second Circuit instead focused its attention, in accordance with *Hensley,* on the relationship between the fee award and the overall results obtained in the case. In part because the record revealed that the particular damage award before it was consistent with other awards in fair housing cases, the Second Circuit concluded that the plaintiffs "won an unambiguous victory . . . and their attorneys should recover a fully compensatory fee," id.—a determination perfectly consistent both with Hensley and with the Ninth Circuit's decision in the present case. (See *Hensley,* 461 U.S. at 435; Pet. App. 1 at 1-6 and 1-7).

Similarly, in *Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983) the Tenth Circuit rejected a mechanical proportionality approach as contradictory to *Hensley's* more contextualized focus on the relationship between work expended and overall results achieved. In *Ramos,* a case challenging the constitutionality of prison conditions, the plaintiff

class obtained declaratory and injunctive relief; it did not seek monetary damages. See *Ramos v. Lamm,* 639 F.2d 559, 562 (10th Cir. 1980)[9]. In light of the total success achieved, plaintiffs' attorneys were awarded $709,933.50 in attorney's fees and $32,782.43 in expenses allowable as costs under §1988.

Defendants challenged the fee award as an abuse of discretion. Addressing the question of proportionality, the Tenth Circuit observed:

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice. The amount of the monetary recovery is not as significant as the policy being vindicated. Section 1988 was designed to encourage private enforcement of the civil rights laws. Parties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit. If the court has the impression that a plaintiff spent an excessive amount of lawyer time and simply overwhelmed the defendant in a case in which the litigation onslaught was unnecessary, the court should consider this factor in determining what amount of time was reasonably expended in the litigation. It should not be expressed as a requirement that the fee have a particular rela-

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[9] The original pro se complaint filed in November 1977 by Fidel Ramos did seek compensatory and punitive damages. The amended complaint filed by the National Prison Project and the A.C.L.U. Foundation of Colorado on behalf of Ramos and the plaintiff class in February 1978 sought only declaratory and injunctive relief and dropped the claim for compensatory and punitive damages. *Ramos v. Lamm,* 639 F.2d 559, 562 (10th Cir. 1980).

tionship to the amount of the monetary recovery. 713 F.2d 557.[10]

Thus, the Tenth Circuit in *Ramos*—like the Seventh Circuit in *Lynch,* the Second Circuit in *DiFilippo* and the Ninth Circuit in the present case—has recognized that, while the amount of monetary damages is a factor to be considered in determining the reasonableness of a fee award under §1988, this single factor should not be transformed into a requirement of strict proportionality between damages and fees. Such a mechanical requirement would be contrary to Hensley, in which this Court expressly instructed the lower courts not to apply a "mathematical approach," but rather to consider all relevant factors in evaluating the relationship between the hours expended and the overall results achieved. Both the District Court and the Court of Appeals followed these instructions in the present case.

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[10] Out of context, the first two sentences of this passage perhaps could be interpreted to reject the relevance of monetary damages to the determination of total success achieved in the Hensley formulation. The third sentence in the passage helps to correct any potential misinterpretation, describing the size of the monetary award as "not as significant as the policy being vindicated." Had the Tenth Circuit meant to foreclose consideration of the size of damage awards, this third sentence far more likely would have declared that the size of such awards was "irrelevant to" or "impermissible to consider in" the determination of the total success achieved. Even if one considers the language of the first two sentences ill-chosen, however, the entire passage inescapably reveals that the Tenth Circuit, like *Hensley* and like the Ninth Circuit, was not prohibiting consideration of the size of monetary awards as a factor in the Hensley formulation. The Tenth Circuit was rejecting the practice of tying fee awards to damage awards rather than to the overall results as required by *Hensley*. What matters to the Tenth Circuit is the relationship between total success achieved and reasonable hours expended, not some mechanical approach to or strict proportionality between the size of damage awards and the size of fee awards.

In sum, the Ninth Circuit's rejection of a mechanical proportionality requirement does not conflict either with Hensley or with the decisions of other Circuits, and is not a basis upon which the Writ should be granted.

B. The Ninth Circuit's Rejection of Mechanical Proportionality is Consistent With the Intent of Congress.

In uniformly rejecting the proposition that a §1988 fee award must be proportional to the amount of damages, the decisions of the Ninth Circuit and other circuits are in full accord with the intent of Congress. As this Court recognized in *Hensley,* the legislative history demonstrates that the purpose of §1988 was to insure "effective access to the judicial process" in civil rights cases. 461 U.S. at 429, quoting H. R. Rep No. 1558, 94th Cong., 2d Sess. 1 (1976).

Congress was well aware that such access had not been available to persons like the respondents in the present case. In our society, those whose civil and constitutional rights are the most likely to be violated are those who typically are least able to pay the large attorney's fees and expenses that are routinely billed to more affluent citizens and businesses who wish to enforce their economic rights through the judicial process; "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." H. R. Rep. No. 1558 at 1. Moreover, Congress found that, in cases against governmental bodies and public officials such as the petitioners here, a variety of factors "preclude or severely limit the damage remedy." *Id.* at 8.

The legal system compounds these problems by translating important civil and constitutional rights into relatively small monetary amounts, thereby depriving prospective civil rights plaintiffs of the alternative route of access to the courts that conventional contingent fee arrangements generally provide to prospective personal injury plaintiffs. As Congress recognized, prior to the enactment of §1988 "private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." *Id.* at 2. Congress enacted §1988 for the express purpose of correcting the systemic problem that had made it economically infeasible for private lawyers to accept and litigate such cases. *Id.*

Thus, although Congress acknowledged that one factor among many to be considered in determining a reasonable fee under §1988 is "the amount received in damages, if any," H. R. Rep. No. 1558 at 8.[11] Congress "intended that the amount of fees . . . be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases [,] and not be reduced because the rigths involved may be nonpecuniary in nature." S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976). The Ninth Circuit and other circuits have effectuated this

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[11] As the House Report stated: "The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work and the amount received in damages, if any. . . ." H. R. Rep. No. 1558 at 7.

intent by refusing to apply mechanical proportionality requirements that would once again put the judicial process beyond the economic reach of those who most need its protection.

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CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM REPORTER'S TRANSCRIPT
OF PROCEEDINGS MONDAY,
JANUARY 19, 1981:

THE COURT: * * *

The question of injunctive relief actually was something I wasn't going to address before the Court and I can tell you quite simply why not. While it was clearly not a question brought to the jury, since the jury has nothing to do with granting equitable relief.

THE COURT: Nothing, no.

MR. LOPEZ: — we thought hard and long about precisely what entitlements we had for any of our plaintiffs with respect to some kind of future equitable relief.

But the bottom line of what we would ask for is virtually always denied by a court because a court properly, I think, says that for the future we will assume that all police officers will abide by the law, including the Constitution.

So that we brought nothing and have pursued nothing; indeed because we too agree with the Court that that will happen.

THE COURT: Now let me just say one thing for the record, and that is: That the plea was in there for injunctive relief. There wasn't any reason to pursue it, I suppose. But if you had asked for it against some of those officers I think I would have granted it.

MR. LOPEZ: I hope I can accept that as a proposition that says that in the event that anything happens in the future concerning those officers or our clients in the

City of Riverside, that this Court will remain available for any appropriate equitable relief.

THE COURT: I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was—it would have warranted an injunction. There cannot be a piece of evidence more appalling than the piece of evidence about the officer singing from the helicopter. There can't be any behavior more reprehensible than that, in my opinion.

Now I will not comment on some of the rest of it because part of the rest of the behavior at the time that this occurred was due to the fact that they didn't know what they were doing and they had nobody to tell them what they should do. There was no direction and they just simply lost their heads, totally. That is my opinion from the evidence.

I will not go on to castigate the officers, but in my opinion this was really a very sad day for that police department.

APPENDIX B

(p. 1) UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER,
JUDGE PRESIDING

No. CV 76-1803-MRP

SANTOS RIVERA,

Plaintiff,

vs.

CITY OF RIVERSIDE,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, June 6, 1984

BETH E. CULBERTSON, CSR
Court Reporter Pro Tempore
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

(p. 2) APPEARANCES:

For the Plaintiff:

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For the Defendant:

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Also Present:

Judge Roy B. Cazares

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(p. 4) LOS ANGELES, CALIFORNIA;
WEDNESDAY, JUNE 6, 1984;
3:45 P.M.

THE CLERK: Civil 76-1803, Santos Rivera versus City of Riverside. Counsel, please state your names for the record.

MR. PATTERSON: Patrick Patterson for the plaintiffs, your Honor, and also here is Judge Roy Cazares to answer any questions.

THE COURT: How are you, Judge?

MR. CAZARES: Very well, thank you. Very nice to see you, your Honor.

MR. PATTERSON: And Geráld Lopez, your Honor, is a visiting professor at Harvard Law School. He is unable to be here.

THE COURT: That is all right.

MR. KOTLER: Jonathan Kotler for the City of Riverside.

THE COURT: Now I ordered the file from where it was and I went through the whole file. As you know the question here that I had was to see how that case ap-

plied and this is a classic case of satellite litigation which we are really finding very difficult because I took this case from another judge, as you know, and in order to come to the conclusion I have come to, I had to look back through the file.

Now it is contended here that the fact that you got summary judgment granted should entitle you to legal (p. 5) fees and then nothing because you see yourself, Mr. Kotler, as representing the prevailing parties; don't you?

MR. KOTLER: Your Honor, that issue as I understood it was disposed of three years ago. We are not making any claim in the case.

THE COURT: I know that.

MR. KOTLER: We are not claiming that we are prevailing parties with respect to litigation.

THE COURT: What I am saying is that your claim, in part, is that they did not have success in this litigation which would warrant the grant of that kind of attorney's fees; is that right?

MR. KOTLER: Yes, your Honor.

THE COURT: Well, don't look so mystified. That is your position?

MR. KOTLER: I was listening to the Court, your Honor.

THE COURT: Well then, you state your position.

MR. KOTLER: I agree with the Court's statement. I was just listening to what the Court was saying.

THE COURT: I am saying to you that the reason that you come to that conclusion in part is that a long time

ago a lot of defendants were let out and in this case the defendants who remained in did not have substantial verdicts against them; is that right?

(p. 6) MR. KOTLER: I think what we are claiming, your Honor, is that to the extent that time was put in on those defendants who were eventually let out of the case either by summary judgment or otherwise, that the plaintiffs can't be seen to be prevailing parties with respect to those people.

THE COURT: I know. I know. That is just exactly why I mentioned the motion for summary judgment. That figures in the decision; doesn't it?

MR. KOTLER: Yes, your Honor, but there are other defendants as well that were subsequently dismissed.

THE COURT: I know.

MR. KOTLER: Yes.

THE COURT: And I think having looked at the whole file and having looked at that case on five or six occasions that now we will have to have some findings and I want to tell you how I feel about this.

I feel that the award of fees that I gave was entirely appropriate and I went through again and looked at all of the verdicts and I have considered in depth what kind of work went into the case and I am even inclined to think that there should have been a multiplier. I didn't give a multiplier because I took into consideration the fact that not all of the people who were sued were the subject of a jury verdict. The fact that the verdicts were not (p. 7) extremely large is due to the restrained nature in which that case was tried and I have said that before and I re-

peat it now, the result in my opinion was excellent. You can hardly say that they were not successful when they had 37 jury verdicts and in each one of those jury verdict groups the City of Riverside was found responsible, was held liable and there were five police officers in the group against whom the verdicts were rendered and I am just absolutely convinced that the total accomplishment of this case was quite extraordinary.

I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete. I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success. That is the way I see it. There was a problem about who was responsible for what and that problem was there all the way through to the time that we concluded the case. Some of the officers couldn't agree about who did what and it is (p. 8) not at all surprising that it would, in my opinion, have been wrong for you not to join all those officers since you yourself did not know precisely who were the officers that were responsible.

Now the fact they were let our later may or may not have been a correct ruling on the part of Judge Ferguson. I have great admiration of him. He is an absolutely su-

perb judge but we all grant summary judgments knowing that they are often reversed in the appellate court. I don't purport I could do so, but having looked at the file, I am not passing judgment on the people who were let out of the case. I am just saying that it seems to me there was total success here.

Now I have touched on the fact that it was never actually clear what officer did what until we had gotten through with the whole trial.

I have mentioned to you that I did not think—and I told you this before—I did not think that the plaintiffs exaggerated their injuries. They had great dignity I thought when they testified and on that basis and the basis that juries I think are reluctant to bankrupt police officers —and well they ought to be—I think that it is totally understandable what the size of the verdicts were but there were 37 of them and let's not forget that.

(p. 9) If you remember there were seven for Jerome Rivera and there were four for Santos Rivera, four for Larabee, four for the boy Daniel, Jennie Rivera got four; Lee-Roy Rivera had three, Enrique Flores had five and Manuel Flores had six.

I can never be brought to see that as a case in which you did not totally prevail. You had great success.

I also think it was very difficult to go through the issues in that case.

It took two of my clerks one whole week to just sort out the jury instructions which I gave them with notes and comments that I myself made.

I know you would have had a very difficult time if you had been any of those plaintiffs finding somebody to take the case. I know that. I am well aware of how reluctant people are. I am asked to get counsel for cases all the time. I can't find counsel for them and I think that here the time was well spent and I want to pause just for a minute because I want you to do a set of findings—proposed findings.

The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it. It reflected a total lack of professionalism on the part of the police there and the improper motivation which appeared as a (p. 10) result of all of this seemed to me to have pervaded a very broad segment of police officers in the department.

I tried on several occasions to settle this case. I was unable to do so.

I am aware that we had an exchange about the settlement offer before, but I remember bringing the whole family here. I tried my best to get somebody to listen about an adequate offer. No adequate offer was ever suggested. You know, I understand one later on occurred but that was well after you had spent thousands of dollars on preparation for trial, I am sure.

JUDGE CAZARES: Just on that point, if I may—

THE COURT: Yes.

JUDGE CAZARES: —I was surprised when I read that because I don't recall any offer being made prior to trial in that amount and then I recall leaving the court-

room after the jury began their deliberations and he made an offer in the corridor but that was after the trial was concluded.

THE COURT: Well, let me tell you that my memory of this meeting with this family—although I must say I see so many people I sometimes forget—but I will never forget that occurrence and it seems to me that the expenditure of funds here became absolutely necessary. There was not any possible way that you could have avoided (p. 11) putting in that amount of time and finally I say to you that I really believe that if you were in another courtroom and you were talking to another judge, you would be perfectly justified in asking for a multiplier. I looked at those services. I looked at the file. It seems to me that we are not just talking about anything except a successful lawsuit in which the jury very properly balanced the interests of the City of Riverside and the police department and came out with the size verdicts that it did.

Mr. Kotler, I will never believe that under Hensley this is not an appropriate award. I tell you that with respect to taking out some of the police officers, I think if you had a difference of opinion about some of them who were let out so now I will tell you I am not going to change my mind. I am going to let the award stand but I do want to have Mr. Patterson prepare, based on what I have said today, a set of findings that will finally put an end to all of this under Hensley.

Now I tell you you can say to yourself, Judge Cazares, that you did a very good job and you can say that with respect to Mr. Lopez as well. I do not intend to change my mind. Now you submit the finding to me and I will

go over them and if they are in conformity with — I ordered the orginal file. I am keeping it until I get (p 12) the findings.

When will you do that?

MR. PATTERSON: Well, your Honor, I would like to have a copy of the transcript, of the Court's comments today.

THE COURT: You won't be too long doing that?

THE REPORTER: One week.

THE COURT: Now you notice when you get this transcript I have not come out with something that was canned. I did not come out here to read from something. I was, when I went through this, just looking at my notes.

I feel very strongly about this case and I feel very strongly about all litigation involving police officers. They have a very hard job to do and I do not want them to be penalized in any way nor the City of Riverside and that is why you didn't get the multiplier, but I certainly think one was warranted. You had absolutely total success.

Now you take the transcript and you may use that as a guide but the findings will be in a position so that the appellate court can look at them and see if I have adequately analyzed what is going on here.

MR. PATTERSON: Yes, I understand that, your Honor. I will attempt to do it. I would not need more than two weeks after getting the transcript.

THE COURT: All right. The transcript will be (p 13) ready in one week. It will be three weeks then.

MR. KOTLER: Your Honor, will we have time to respond to the proposed findings?

THE COURT: No, because I will tell you what I will do. I will set a hearing date for you to come in and do it orally. I do not intend to have — you know, that is probably not fair to you, but you see, I have kept them from having this so far for months and months and months. Now it took me a month to get this out of storage and they couldn't find the verdicts. Now we are going to bring an end to this.

All right. You have as long as you want. You tell me how much time you want.

MR. KOTLER: Two weeks after I receive the transcript.

THE COURT: You set the date by stipulation.

MR. PATTERSON: We can do that, your Honor.

THE COURT: And then you will give me an order and I will sign that and that will give me some guidance as to what you want to do. If you want to come in and discuss it, put that in the order, too, and that will be on Monday afternoon.

MR. KOTLER: One more matter. As I understand the Court's ruling, the Court is going to make an order awarding the exact same amount of fees that were ordered previously?

(p 14) THE COURT: Yes.

MR. KOTLER: We have kept our appeal bond on file. It is still good and in perfect order. If it becomes necessary to take a further appeal of this matter rather

than come back into court and post another bond, may I stipulate that we keep the same bond on file?

THE COURT: Put that in the order, too.

MR. KOTLER: All right.

THE COURT: That is fine.

I want to note something. I think this is terribly unfair to keep going up and down through the apellate court. I really think it is very unfair but it is your right to do it. If I were a city and I had all the money I needed to finance this to take place I guess I would maybe do that. I can't believe that the City of Riverside after what happened with the facts in this case would not try to get this worked out, but if what you want is litigation, by golly, that is what we are going to have.

MR. KOTLER: For the record, your Honor, the City of Riverside hasn't paid a penny other than the deductible and that was years ago.

THE COURT: I am very dismayed about this. I think any fair appellate court that I looked at the facts of this case would be appalled just as I was appalled and I have not had one other case in my courtroom in which I felt (p 15) that deeply about what took place. This was, in my opinion, totally wrong behavior for which there is absolutely no excuse whatsoever. I have never had a set of facts I felt more deeply about and I did not know at the time of the settlement conference just how reprehensible the behavior of some of those police officers was and I am sorry that I had to find out. That's it.

MR. PATTERSON: Your Honor, just in response to the possibility of another appeal, I wanted to advise the Court that if that does occur we will be coming back into court for a request for fees.

THE COURT: Do whatever you want to about that. I just feel this is so terribly unfair, the whole thing. I think it was, first of all, a bad set of facts, and I think it is getting worse, so that is my opinion and I have expressed it.

MR. KOTLER: Thank you.

MR. PATTERSON: Thank you, your Honor.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Beth E. Culbertson — 6-12-84
Official Reporter — Date